BEFORE THE

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Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	MM Docket 93-25
Protection and Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

Time Warner Cable hereby petitions for reconsideration of certain aspects of the Commission's Report and Order in MM Docket 93-25, FCC 98-307, released November 25, 1998 ("DBS Public Interest Order"), implementing Section 335 of the Communications Act of 1934 ("Communications Act") concerning the public interest obligations of Direct Broadcast Satellite ("DBS") service providers. In its DBS Public Interest Order, the Commission declined to level the regulatory playing field and chose instead only to impose upon DBS licensees the bare minimum public interest obligations mandated by Section 335 of the Communications Act. This choice is faulty in three respects.

First, at a minimum, DBS providers should be subject to public interest obligations equivalent to cable operators' public, educational and governmental ("PEG") access obligations. When Congress enacted Section 335 in 1992, it clearly anticipated that certain undefined public interest obligations, in addition to the political broadcasting requirements mandated by that section, should be imposed on DBS providers, and that DBS presented an opportunity to advance the goals of localism. While the Commission attempts to justify its decision not to impose any public interest obligations on DBS providers in addition to the bare minimum mandated by statute because DBS "is a relatively new entrant attempting to compete with an established, financially stable cable industry," historically, the Commission has not considered small size or lack of incumbency to serve as an absolute bar to imposing burdensome administrative regulations on a particular service. Indeed, Congress and the Commission imposed extensive regulatory obligations on both the cable industry and open video system ("OVS") operators at times when both services served far fewer subscribers than

DBS now enjoys. The favoritism now enjoyed by DBS providers *vis-a-vis* cable and OVS operators is unprecedented and irrational.

The Commission also argues that "localism" obligations -- such as PEG access financial support -- may be premature for DBS because it is currently primarily a national service, compared to the more local or regional character of cable and OVS operators. This argument should not excuse DBS providers from any public interest obligations beyond those mandated in Section 335. In order to rectify the current regulatory imbalance, the Commission should require DBS providers to contribute 5% of their gross receipts directly to support the creation and development of programming aired on PBS, the national equivalent of non-commercial PEG programming. Such a requirement would directly mirror analogous obligations imposed on both OVS and cable operators. Moreover, while DBS may still be primarily a national service, there is no rational basis to exempt DBS from complying with certain regulatory burdens that are not specifically local in scope, including regulations regarding access to programming, channel occupancy limits, leased access, regulation of carriage agreements, negative option billing practices, anti-buy-through, commercial limits on children's programming, implementation of a national emergency alert system, and protection of subscriber privacy.

Second, in order to better effectuate the Congressional goals underlying Section 335(b)(1), the Commission must not allow DBS providers to satisfy the 4% channel capacity set-aside for the carriage of noncommercial programming of an educational or informational nature by carrying otherwise eligible programming services, such as C-SPAN, that such providers are already carrying as of the effective date of the 4% channel capacity reservation

rules. To the extent that DBS providers are allowed to fill up their 4% channel capacity set-aside with programming services such DBS providers have already chosen to carry in the absence of the channel capacity set-aside requirement, the goal of opening up channel capacity to encourage the development and success of new or highly specialized noncommercial educational or informational programming would be thwarted. Time Warner Cable thus encourages the Commission to amend its proposed DBS channel capacity set-aside rules to mandate that DBS providers cannot satisfy the 4% channel capacity reservation through the carriage of noncommercial programming of an educational or informational nature that was carried as of the effective date of the channel capacity set-aside rules.

Finally, the Commission's decision to hold DBS licensees responsible for meeting the public interest obligations contained in Section 335 unfortunately ignores the fluid state of the DBS industry today and the fact that a particular DBS licensee may not have any input whatsoever regarding the choice of programming offered by the particular DBS service provider. The decision to impose the Section 335 public interest obligations on DBS licensees is also completely inconsistent with Commission practice regarding the DBS industry's compliance with closed captioning and EEO regulations. The Commission must recognize that Section 335 dictates that it is the DBS program packager -- the entity responsible for the selection, packaging and marketing of the actual DBS program service delivered to customers under Part 100 of the Commission's rules, *i.e.*, the true DBS "provider" -- which is responsible for complying with the obligations imposed pursuant to that statutory section.

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To: The Commission

PETITION FOR RECONSIDERATION

Time Warner Cable,[1] by its attorneys and pursuant to Section 1.429 of the Commission's rules,[2] hereby petitions for reconsideration of certain aspects of the Commission's Report and Order in MM Docket 93-25, FCC 98-307, released November 25, 1998 ("DBS Public Interest Order").[3] In its DBS Public Interest Order, the Commission

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[1]Time Warner Cable, a division of Time Warner Entertainment Company, L.P., operates numerous cable television systems across the United States. An affiliate of Time Warner Cable holds an interest in PRIMESTAR Partners, L.P., a direct-to-home satellite programming service provider. Other affiliates of Time Warner Cable provide programming to multichannel video programming distributors ("MVPDs").

[2]47 C.F.R. § 1.429.

[3]47 C.F.R. § 1.4(b)(1) provides that petitions for reconsideration of a final Commission action in a rulemaking proceeding may be filed within 30 days of the date of publication of the applicable Commission order in the Federal Register. A summary of the Commission's DBS Public Interest Order was published in the Federal Register on February 8, 1999. 64 Fed. Reg. 5951 (Feb. 8, 1999). Thus, petitions for reconsideration in the instant proceeding are due to be filed by March 10, 1999.

implemented Section 335 of the Communications Act of 1934 (the "Communications Act")[4] concerning the public interest obligations of Direct Broadcast Satellite ("DBS") service providers.

It is undeniable that DBS has experienced tremendous growth as a competitive service since the passage of the 1992 Cable Act. Despite recognizing that "the DBS industry has grown significantly since 1992,"[5] and despite its recognition of the perils of placing competitors on "an uneven competitive footing,"[6] the Commission declined to level the regulatory playing field in its DBS Public Interest Order and chose instead only to impose upon DBS licensees the bare minimum public interest obligations mandated by Section 335 of the Communications Act. This choice is faulty in three respects: (1) at a minimum, DBS providers should be subject to public interest obligations equivalent to cable operators' public, educational and governmental ("PEG") access obligations; (2) DBS providers cannot be allowed to fulfill the 4% channel capacity set-aside requirement through the carriage of noncommercial programming of an educational or informational nature already carried on their DBS systems; and (3) public interest obligations should apply to high power DBS providers, not DBS licensees. Time Warner Cable thus respectfully requests that the Commission reconsider its DBS Public Interest Order as explained more fully below.

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[4]47 U.S.C. § 335. That Section was added by Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. 102-385, 106 Stat. 1460 (1992).

[5]DBS Public Interest Order at ¶ 60.

[6]Id. at ¶ 30.

I. AT THE VERY LEAST, DBS SERVICE PROVIDERS SHOULD BE SUBJECT TO PUBLIC INTEREST OBLIGATIONS EQUIVALENT TO CABLE OPERATORS' PEG OBLIGATIONS.

Section 335(a) of the Communications Act directs the Commission to initiate a rulemaking proceeding "to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming" that shall, at a minimum, include certain political broadcasting requirements. Moreover, Congress directed the Commission to "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through . . . regulation of . . . such service." When this statutory section was enacted in 1992, there were no operational full power DBS operators, yet Congress anticipated that certain undefined public interest obligations, in addition to political broadcasting requirements, should be imposed on DBS providers, and that DBS presented an opportunity to advance the goals of localism.

Now, seven years later, even when confronted with a DBS industry experiencing explosive growth, the Commission has declined to impose any public interest obligations on DBS providers in addition to the bare minimum mandated by statute because DBS "is a relatively new entrant attempting to compete with an established, financially stable cable industry."[7] The Commission also justified its failure to level the regulatory playing field between DBS providers and MVPDs such as cable and open video systems ("OVS") because "the primary coverage area for DBS is national" while "[c]able, on the other hand, is primarily

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[7] Id. at ¶ 60.

a regional or local service that does not possess any of the national attributes associated with the DBS service."[8] Neither rationale provides a legitimate reason to exempt DBS providers from all but the bare minimum of public interest obligations, particularly in light of the Commission's conclusion that "Section 335(a) provides ample authority for us to impose other public interest programming requirements on DBS providers . . . ."[9]

It is beyond dispute that DBS providers have become direct competitors to cable television and that DBS providers have attempted to design a service that is essentially indistinguishable from cable television service. It is also undeniable that, as the Commission notes, "the DBS industry has grown significantly since 1992."[10] In fact, the DBS industry is growing so rapidly that any subscriber figures relied upon quickly become obsolete. In its DBS Public Interest Order, the Commission relies on a figure of 7.9 million DBS subscribers nationwide as of the end of September 1998,[11] yet DBS subscriber data as of March 3, 1999, approximately five months later, indicates 9.06 million DBS subscribers nationwide.[12] This change represents an increase of over 1 million DBS subscribers in that short time period, or an increase of approximately 15% over the September 1998 DBS subscriber count. Similarly, since the Commission requested an additional round of comments in this rulemaking proceeding at the end of April 1997, the DBS industry has increased its subscribership from 5

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[8]Id. at ¶ 59.

[9]Id. at ¶ 64.

[10]Id. at ¶ 60.

[11]Id. at ¶ 4.

[12]See http://www.dbsdish.com/dbsdata.html.

million subscribers nationwide as of April 30, 1997 to the current 9.06 million figure. This increase of over 4 million subscribers represents an 81% increase over the April 1997 subscriber count.[13]

Moreover, a recent trade press article reports that consolidations in the DBS industry have resulted in DirecTV and EchoStar both ranking among the top 10 MVPDs nationwide in subscribership, with DirecTV ranked as the fourth largest MVPD nationwide and EchoStar ranked as the eighth largest.[14] Indeed, at a recent conference, panelists enthused that leading DBS providers could eventually reach the top of the multichannel business and that the DBS industry could serve more than 25 million subscribers by 2003.[15] Yet, incredibly, the FCC still believes that the DBS industry is a struggling new service that requires regulatory protection so as not to "hinder the development of DBS as a viable competitor to cable."[16] This concern that developing MVPD competitors be shielded from long-standing regulatory obligations appears, however, to apply solely to DBS.

For example, OVS is not protected in the same fashion despite the ability of OVS to provide competition to cable operators.[17] Congress has subjected OVS operators and

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[13]See id.

[14]"DBS Poised for Continued Growth, Panelists Say at Satellite 99," Communications Daily, Feb. 5, 1999, at 4-5.

[15]Id.

[16]DBS Public Interest Order at ¶ 60.

[17]See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, 11 FCC Rcd 18223, ¶¶ 2, 24 (1996) ("OVS Second Report and Order") ("[t]he underlying premise of Section 653 is that open video system

(continued...)

programmers to numerous Title VI provisions, including PEG access[18] and payments to localities in lieu of cable franchise fees, as well as relevant FCC cable television rules, including must-carry, sports blackout, network nonduplication and syndicated exclusivity obligations.[19] The Telecommunications Act of 1996[20] also subjects OVS operators to non-discrimination requirements regarding their programmer-customers, as well as channel occupancy limits where channel capacity demand exceeds supply.[21] Obviously, Congress believed that OVS' designation as a competitor to cable must be accompanied by a level of regulatory parity with cable. There is no reason why DBS providers should be treated differently, particularly given the fact that, like DBS, OVS is also a "relatively new entrant," yet no OVS operator is remotely as large as either DirecTV or EchoStar, two of the top ten largest MVPDs nationwide. In fact, in its most recent annual competition report, the Commission estimates a total of 66,000 OVS subscribers nationwide as of June 1998.[22] This figure comes nowhere near the estimated 7.2 million DBS subscribers nationwide during that

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[17](...continued)
operators would be new entrants in established markets, competing directly with an incumbent cable operator") (footnote omitted).

[18]47 U.S.C. § 573(c)(1)(B).

[19]47 U.S.C. § 573(b)(1)(D).

[20]Pub. L. 104-104, 110 Stat. 56 (1996).

[21]47 U.S.C. §§ 573(b)(1)(A)-(B). Compare 47 U.S.C. § 548 (cable program access requirements).

[22]Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report, CS Docket No. 98-102, FCC 98-335, Table C-1 (rel. Dec. 23, 1998).

same time period,[23] and indeed, nationwide OVS subscriber totals as of June 1998 represent a mere 0.9% of the total DBS subscribers nationwide during that same time period.

In fact, it is clear that historically, the Commission has not considered small size or lack of incumbency to serve as an absolute bar to imposing burdensome administrative regulations on a particular service. Indeed, extensive regulatory obligations were imposed on the cable industry while it was still a nascent service with far fewer subscribers than DBS now enjoys.[24] As early as 1966, the Commission adopted signal carriage, non-duplication and distant signal requirements for cable operators.[25] Thus, the favoritism now enjoyed by DBS providers *vis-a-vis* cable and OVS operators is unprecedented and irrational. DBS providers cannot be allowed to continue to roam the competitive landscape unfettered by the types of regulatory burdens cable operators must bear.

The most egregious example of the Commission's failure to carry out Congressional directives to impose appropriate public interest programming and localism obligations on DBS providers is the failure to adopt equivalent obligations in the area of local programming, particularly in light of Congress' express directive that the Commission seize this opportunity to require DBS providers to advance the statutory goal of localism. While the requirement that DBS providers set aside 4% of their channel capacity for non-commercial programming of an

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[23]Id.

[24]The cable industry served only an estimated 1.575 million subscribers in 1966. Warren Publishing, Television & Cable FactBook, Cable Vol. 66, 1998, at F-1. See also Paul Kagan Associates, Cable TV Financial DataBook, 1996, at 10 (citing a figure of 1.5 million basic subscribers in 1965). In contrast, DBS now serves over 9 million estimated subscribers.

[25]Second Report on CATV Regulation, 6 RR 2d 1717 (1966) (subsequent history omitted).

educational or informational nature[26] might be argued to roughly approximate cable operators' PEG channel set-aside requirements, currently there is no analogous obligation to match cable operators' obligations to provide funding to support the creation of local programming to air on PEG access channels. The failure to adopt any obligation for DBS providers to financially support the creation of local, public interest programming is yet another example of an unwarranted regulatory laissez-faire approach toward DBS providers as well as a failure to carry out the Congressional mandate to impose appropriate public interest and localism obligations on DBS, over and above the bare-bones requirements specifically outlined in Section 335 of the Communications Act.

Indeed, cable operators -- which today often have less capacity than DBS systems -- must provide PEG access channels for free and forego the revenues that could be produced by commercial services.[27] In addition, these PEG channel set-asides, as significant as they are, represent only part of a cable operator's PEG obligations and expenses. As Time Warner Cable detailed in its comments in this proceeding, it spends millions of dollars and countless work hours each year to meet PEG programming support requirements. Typical PEG programming obligations might be in the form of in-kind contributions, such as the provision of cameras, studio equipment, mobile vans, modulators, video tape recorders, fully equipped

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[26]DBS Public Interest Order at ¶ 74.

[27]47 U.S.C. § 531(b).

studio facilities, or other production equipment; or in the form of periodic cash payments to local authorities or access organizations to produce PEG access programming.[28]

In addition, as noted earlier, OVS operators are subject to PEG access requirements such that, in cases where an OVS operator and a local franchising authority cannot come to an agreement regarding the OVS operator's PEG access obligations, the OVS operator must "satisfy the same PEG access obligations as the local cable operator."[29] There is no logical basis for holding that DBS providers should not also be required to satisfy local programming support requirements equivalent to those imposed upon OVS and cable operators. Particularly given the relative size, maturity and profitability of DBS providers compared to OVS providers, the Commission cannot rationally exempt DBS providers from PEG-equivalent access funding obligations through reliance on the "nascent industry" rationale set forth in the DBS Public Interest Order.[30]

The Commission has argued that "localism" obligations -- such as financial support for the creation of local programming -- may be premature for DBS because it is currently primarily a national service, compared to the more local or regional character of cable and OVS operators. While Time Warner Cable disputes the legal validity of any such distinction, to the extent that DBS service can currently be properly characterized as primarily national in scope, pending legislative changes to the Satellite Home Viewer Act could provide DBS with

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[28]See Comments of Time Warner Cable, filed Apr. 28, 1997, at 41-42.

[29]OVS Second Report and Order at ¶ 141.

[30]DBS Public Interest Order at ¶ 60.

the ability to become every bit as "local" or "regional" as the Commission observes the cable industry now is.[31] At any time in the future when DBS commences carriage of local broadcasting signals on a widespread basis, there will be no difference at all in the final product provided by DBS, cable, or OVS from the consumer's perspective and no rational basis could exist for imposing different regulatory burdens on such services. The Commission apparently recognizes this point, noting that "if the legal and technical issues regarding localized programming are resolved, we may consider requiring DBS providers to offer some amount of locally-oriented programming."[32]

In the meantime, the Commission should require DBS providers to contribute 5% of their gross receipts (an amount analogous to the franchise fee amounts currently paid by the majority of cable operators) directly to support the creation and development of programming aired on PBS. PBS is essentially the national equivalent of non-commercial PEG programming, and such a support obligation would be equivalent to cable operators' local PEG access support obligations. At such time as DBS is authorized to rebroadcast local broadcast signals, and thus can no longer be properly characterized as essentially a "national" service, the Commission could fulfill its commitment to impose requirements regarding financing the creation of local programming by requiring that 5% of a DBS operator's gross receipts be applied to fund production of local programming.

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[31] Id. at ¶ 59.

[32] Id. at ¶ 54.

Moreover, even while DBS is still primarily a national service, there is no rational basis to exempt DBS from complying with certain regulatory burdens that are not specifically tied to providing locally-oriented programming. Such burdens that are not particularly local in scope include regulations regarding access to programming, channel occupancy limits, leased access, regulation of carriage agreements, negative option billing practices, anti-buy-through, commercial limits on children's programming, implementation of a national emergency alert system, and protection of subscriber privacy. When DBS does obtain Congressional authority to carry local broadcast signals, the regulatory burdens cable now bears that are associated with the carriage of such local broadcast stations -- for example, must-carry, local television station cross-ownership restrictions, network nonduplication, syndicated exclusivity and sports blackout requirements -- obviously must also be borne by DBS operators.

The Commission should seize this opportunity now to start leveling the regulatory playing field between DBS and other MVPDs such as cable and OVS. DBS is no longer a struggling, new entrant entitled to extra protection that was never even afforded to cable and OVS at the time those services entered the competitive arena. While some regulatory discretion may have been warranted in the early part of this decade when it was unclear what shape the DBS industry would take and what level of success DBS service would enjoy, it is now clear that DBS has gained a stronger presence than either Congress or the Commission initially might have imagined and that DBS should be treated equivalently to other MVPDs with respect to regulatory burdens.

Continued failure to impose equivalent public interest obligations on DBS providers directly implicates the Equal Protection guarantee of the U.S. Constitution.[33] Without a level regulatory playing field, the extensive regulations imposed upon both cable and OVS operators become more constitutionally suspect. While Time Warner Cable is not asking the Commission to eliminate the regulations currently imposed upon both cable and OVS operators at this point, it is clear that the Commission should now act upon the authorization granted to it by Congress pursuant to Section 335 of the Communications Act to impose appropriate equivalent public interest obligations on DBS providers.

II. DBS PROVIDERS CANNOT BE ALLOWED TO FULFILL THE FOUR PERCENT CHANNEL CAPACITY SET-ASIDE REQUIREMENT THROUGH THE CARRIAGE OF PROGRAMMING ALREADY CARRIED ON THE EFFECTIVE DATE OF THE COMMISSION'S SET-ASIDE RULES.

Pursuant to Section 335(b)(1) of the Communications Act, in its DBS Public Interest Order, the Commission elected to require DBS providers to set aside the statutory minimum of 4% of their channel capacity exclusively for the carriage of noncommercial programming of an educational or informational nature.[34] Time Warner Cable believes that, in order to better effectuate the Congressional goals underlying Section 335(b)(1), the Commission must not allow DBS providers to satisfy the 4% channel capacity set-aside requirement by carrying otherwise eligible programming services, such as C-SPAN, that such providers are already carrying as of the effective date of the 4% channel capacity reservation rules.

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[33]U.S. Const. amend. XIV, § 1. See also Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (the FCC is required to treat similarly situated parties in like fashion).

[34]DBS Public Interest Order at ¶ 74.

The Commission recognizes that Congress intended to "foster through Section 335(b) a robust and editorially diverse noncommercial educational programming service."[35] To the extent that DBS providers are allowed to fill up their 4% channel capacity set-aside with programming services such DBS providers have already chosen to carry in the absence of any channel capacity set-aside requirement, the goal of opening up channel capacity to encourage the development and success of new or highly specialized noncommercial educational or informational programming would be thwarted. Indeed, in limiting to one the number of channels a particular DBS provider can allocate to a single qualified program provider, the Commission noted that

> limiting the amount of set-aside capacity a DBS provider can allocate to a single qualified noncommercial programmer will *promote increased development of quality educational and informational programming* for carriage on the set-aside channels. Prohibiting a DBS provider from initially allocating more than one set-aside channel to a single programmer will increase the opportunity for other qualifying, non-affiliated national educational programming suppliers to gain access. This will *make available to the U.S. viewing public a greater variety of educational and informational programs* and will provide an opportunity for carriage of programming that might not otherwise be shown . . . . [W]e believe that it is reasonable to infer that Section 335(b) reflects Congress' desire that this set-aside capacity be a forum for a range of noncommercial voices that otherwise might not be heard.[36]

Thus, in order for the 4% channel capacity reservation requirement to be truly meaningful and to serve the recognized goal of providing a forum for "noncommercial voices that otherwise might not be heard" and to "make available to the U.S. viewing public a greater variety of educational and informational programs," it is imperative that DBS providers not be

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[35]Id. at ¶ 117.

[36]Id. at ¶¶ 116-17 (emphasis added).

allowed to satisfy the channel capacity set-aside requirement by merely continuing to carry noncommercial educational or informational program services they already carry. If the channel capacity set-aside requirement could be satisfied in such a cavalier fashion, there would be no need for the 4% channel capacity reservation in the first place.

It is clear that Congress anticipated that the channel capacity reservation mandated by Section 335(b)(1) would be filled by entities that otherwise would not necessarily be chosen by a DBS provider for carriage on the DBS system. Section 335(b)(3) mandates that DBS providers shall make channel capacity available to noncommercial educational or informational programming suppliers "upon reasonable prices, terms, and conditions," with specific guidance given to the Commission in Section 335(b)(4) with respect to determining what constitutes "reasonable prices." Thus, Congress anticipated that noncommercial programming suppliers would need to lease the reserved channel capacity at reasonable rates. This stands in sharp contrast to the situation where a DBS provider voluntarily pays for the right to distribute programming that the DBS provider feels will attract more subscribers due to the programming's presence in the channel line-up. If DBS providers are allowed to satisfy the 4% channel capacity set-aside requirement by carriage of program services already carried and for which the DBS provider pays a fee for the privilege of carrying, the newer or more highly specialized noncommercial programming Congress intended to nurture will be blocked from obtaining access to DBS systems and Section 335(b) will have no meaningful impact.

Time Warner Cable thus encourages the Commission to amend its proposed DBS channel capacity set-aside rules to mandate that DBS providers cannot satisfy the 4% channel capacity reservation through the carriage of noncommercial programming of an educational or

informational nature that was carried as of the effective date of the channel capacity set-aside rules. Such a limitation is certainly not without precedent. For example, the 1992 Cable Act amended Section 612 of the Communications Act, pertaining to cable operators' leased access obligations, in part by adding a section providing that cable operators could use 33% of the channel capacity set aside for leased access use for the provision of programming from a qualified minority programming source or from any qualified educational programming source. However, no programming provided by a cable system as of July 1, 1990 could qualify as minority or educational programming for purposes of that subsection.[37] The effect of such a date-certain limitation is to encourage the development and distribution of new minority and educational programming for carriage by cable systems pursuant to Section 612(i)(1). A similar limitation in the DBS context would likewise promote access to DBS systems for a wider variety of noncommercial educational and informational programming, thus serving the goals underlying the channel capacity set-aside requirement contained in Section 335(b)(1).

III. PUBLIC INTEREST OBLIGATIONS SHOULD APPLY TO HIGH POWER DBS PROVIDERS, NOT DBS LICENSEES.

Confronted with ambiguity in Section 335 and the relevant legislative history regarding whether public interest obligations should be imposed on DBS providers or DBS licensees, the Commission chose in its DBS Public Interest Order to hold DBS licensees responsible for meeting the public interest obligations contained at both Section 335(a) (the section mandating that the Commission promulgate rules requiring DBS providers to comply with certain political

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[37] 47 U.S.C. § 532(i)(1).

broadcasting requirements and other undefined public interest obligations) and Section 335(b) (the section requiring a channel capacity set-aside for noncommercial programming of an educational or informational nature).[38] The Commission's decision to hold DBS licensees responsible for meeting the public interest obligations contained in Section 335 unfortunately ignores the fluid state of the DBS industry today and the fact that a particular DBS licensee may not have any input whatsoever regarding the choice of programming offered by the particular DBS service. The decision to impose such public interest obligations on DBS licensees is also completely inconsistent with Commission practice regarding the DBS industry's compliance with closed captioning and EEO regulations.

As the DBS marketplace evolves and business arrangements increasingly provide that the DBS licensee and the DBS program packager might be separate entities, the Commission must recognize that Section 335 dictates that it is the DBS program packager -- the entity responsible for the selection, packaging and marketing of the actual DBS program service delivered to customers under Part 100 of the Commission's rules, *i.e.*, the true DBS "provider" -- which is responsible for complying with the obligations imposed pursuant to that statutory section. The obligations imposed by Section 335 do not refer to the DBS "licensee." On the contrary, Section 335(a) specifically requires the Commission to impose, "on providers

[38]DBS Public Interest Order at ¶¶ 17, 21-27.

of direct broadcast satellite service," various public interest requirements.[39] Likewise, the 4-7 percent channel set-aside in Section 335(b) is to be applied to the "provider" of DBS service.[40]

The term "provider" of DBS service is not specifically defined for purposes of Section 335(a). While the definition applicable to the Section 335(b) channel set-aside by its terms only refers to Part 100 licensees and to distributors controlling a minimum number of channels using a Part 25 Ku-band fixed service satellite system for the provision of video programming directly to the home,[41] it is clear from the legislative history that Congress understood and anticipated that the DBS provider would not necessarily be the DBS licensee. Rather, the legislative history of Section 335 is clear that the requirements therein

> are intended to apply only to direct broadcast satellite providers, which the Commission shall interpret to mean a person that uses the facilities of a direct broadcast satellite system to provide point-to-multipoint video programming for direct reception by consumers in their homes. The Committee does not intend that

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[39]47 U.S.C. § 335(a) (emphasis added).

[40]47 U.S.C. § 335(b).

[41]47 U.S.C. § 335(b)(5)(A). While Time Warner Cable believes that the Section 335 requirements apply to all Part 100 DBS service providers, should the Commission ultimately determine that it is constrained by the statutory language to apply the Section 335(b) channel set-asides only to Part 100 DBS licensees, the Commission is not similarly constrained with respect to the applicability of the Section 335(a) public interest requirements to Part 100 DBS programming providers in the absence of a specific definition applicable to that subsection. Indeed, while the Section 335(b) channel set-asides constitute a technical requirement that Part 100 DBS licensees could easily accomplish, only the actual Part 100 DBS service providers are in a position to directly comply with the Section 335(a) public interest requirements relating to the program content offered by such programming providers. While the Commission states in paragraph 27 of the DBS Public Interest Order that it received no comments on the issue of whether the term DBS "provider" should be defined in the same manner for Section 335(a) as for Section 335(b), Time Warner Cable notes that it did address this issue at footnote 122 of its Comments filed April 28, 1997 in this proceeding.

> the licensed operator of the DBS satellite itself be subject to the requirements of this subsection unless it seeks to provide video programming directly.[42]

Unlike the present Commission, Congress in 1992 did not have the benefit of observing the maturing DBS industry today. Yet, even at a time in the early stages of DBS service when it easily could be assumed that the DBS licensee and the DBS program packager (the true DBS "provider") would be the same entity, Congress recognized the possibility that the technical operations and the programming functions of a Part 100 DBS satellite could be separated, and expressed its preference that public interest obligations be imposed on the entity using the facilities of the DBS system, *i.e.*, the DBS "provider." The fact that the Section 335(b)(5)(A)(i) statutory definition of "provider of direct broadcast satellite service" refers only to Part 100 licensees is simply an historical anomaly traceable to the fact that at the time Section 335 was enacted, no full-power DBS services licensed under Part 100 of the Commission's rules were operational.

In other words, historically, a Commission licensee would be synonymous with the programming "provider," whether it be in the broadcast or cable context. Thus, it is entirely conceivable that, in drafting Section 335, Congress fully intended, as the legislative history quoted above states, to impose public interest obligations upon "a person that uses the facilities of a direct broadcast satellite system" but yet used the term "licensee" as the equivalent of "provider" without fully attending to the strong possibility that such entities may not be the same.

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[42]H.R. Rep. No. 628, 102d Cong., 2d Sess. 124 (1992) (emphasis added).

In justifying imposing DBS public interest requirements on non-U.S. licensed satellites providing DBS service in the U.S., in its DBS Public Interest Order, the Commission did not hesitate to effectively fill in the blanks left by a Congress that passed a law in 1992 without the benefit of observing the DBS industry as it exists today. In justifying extending the scope of Section 335 to cover such non-U.S. licensed DBS operations, the Commission noted that "[a]lthough Congress did not address the issue of Section 335's applicability to non-U.S. licensed satellites, we note that there were no non-U.S. licensed satellites proposing to provide DBS service in the United States at the time the statute was enacted."[43] Yet, the Commission refuses to apply this same logic with respect to U.S. licensed DBS operations that have taken on a different character than the traditional licensee-as-program-provider model. It simply does not make sense for the Commission to treat the statute as a flexible, living document in one instance yet in another instance ignore the plain intent demonstrated by the statute's legislative history and rigidly cling to Congress' inadvertent equating of a "licensee" to a "provider."

Nor does it make sense for the Commission's regulatory scheme to impose responsibility for complying with closed captioning and EEO requirements on a DBS program packager yet impose responsibility for complying with the Section 335 public interest obligations on the DBS licensee. In the EEO context, the Commission defines an MVPD as

> an entity such as, but not limited to, a . . . direct broadcast satellite service . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming, whether or not a licensee. Multichannel video programming distributors do not include an entity which lacks control over the

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[43]DBS Public Interest Order at ¶ 31.

> video programming distributed. For purposes of this subpart, an entity has control over the video programming it distributes, if it selects video programming channels or programs and determines how they are presented for sale to consumers.[44]

Similarly, in the closed captioning context, the Commission observed that

> We believe that we should craft our captioning rules in a manner that will increase the availability of video programming with closed captions most expeditiously as well as focus compliance responsibility. In order to accomplish these goals, we believe it desirable to hold video programming distributors, defined as all entities who provide video programming directly to a customer's home . . . responsible for compliance with our closed captioning rules. Accordingly . . . DBS providers . . . will be responsible for compliance with our rules. We believe that placing compliance obligations on distributors will allow us to monitor and enforce these rules more efficiently.[45]

Thus, in both the EEO and closed captioning contexts, the FCC chose the common sense approach of imposing regulatory compliance obligations on the entity responsible for distributing video programming over the DBS system directly to the public rather than hold a remote DBS licensee responsible that does not attend to DBS programming functions. While the FCC expresses concern in the DBS Public Interest Order that it does not possess as much enforcement power over non-licensees as over licensees,[46] this concern certainly was not an impediment in the EEO and closed captioning contexts and thus cannot rationally serve as an excuse for bypassing DBS provider responsibility for complying with Section 335 public interest obligations. In order to maintain consistency with the relevant legislative history as

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[44]47 C.F.R. § 76.71(a) (emphasis added).

[45]In the Matter of Closed Captioning and Video Description of Video Programming, Report and Order, MM Docket No. 95-176, 9 CR 412, ¶ 27 (1997) (emphasis added).

[46]DBS Public Interest Order at ¶ 23.

well as with other Commission regulations, the Commission must impose Section 335 public interest obligations on the DBS program packager -- the true DBS "provider" -- and not on the DBS licensee.

III. CONCLUSION.

The Commission should reconsider its DBS Public Interest Order in three material respects: (1) whether its decision to refrain from imposing any additional public interest obligations on DBS services other than those public interest obligations specifically enumerated in Section 335 of the Communications Act was correct; (2) whether DBS providers may satisfy the 4% channel capacity set-aside requirement with programming services already carried; and (3) whether the Commission's decision to impose responsibility for complying with Section 335 on DBS licensees and not DBS program packagers was correct. As explained above, the answer to all three questions must be "no." The explosive growth of the DBS industry as well as the possibility for business arrangements resulting in the DBS licensee having no input

regarding the programming carried on a particular DBS service both dictate that the Commission carefully revisit these issues as more fully explained herein.

Respectfully submitted,

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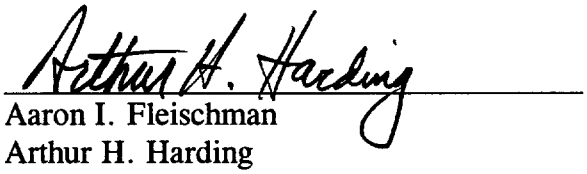

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